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Alien - 1

OGC REVIEW COMPLETED

14 December 1956

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MEMORANDUM FOR: [redacted]

SUBJECT : Loss of Nationality

There follows an explanation of Terrada v. Dulles, 121 F. Supp. 6 (1954) in which the loss of nationality section of the Immigration and Nationality Act of 1940 was held unconstitutional. It appears that Judge McLaughlin of the District Court of Hawaii has been playing the part of St. George against this section of the Act with no support from his colleagues on the bench.

I. Statutes.

8 U.S.C., section 1481(a) describes the various actions by which a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality. They can be summarized as follows:

1. Obtaining naturalization in a foreign state upon his own application.

2. Taking an oath of allegiance to a foreign state.

3. Serving in the armed forces of a foreign state unless authorized in writing by the Secretary of State and Secretary of Defense. (Previously section 801(c).)

4. (a) Serving in any office, post, or employment under the government of a foreign state, if he has the nationality of such foreign state. (This would involve dual nationality.)

(b) Employment under the Government of a foreign state in which an oath of allegiance is required.

5. Voting in a political election in a foreign state. (Previously section 801(e).)

6. Making a formal renunciation of nationality before a diplomatic officer of the United States.

7. Making a formal renunciation of nationality in the United States during wartime if the Attorney General shall approve such renunciation.

8. Deserting military forces in time of war if he is convicted thereof by a court martial and dishonorably discharged.

9. Committing an act of treason, etc., against the United States if he is convicted thereof.

10. Remaining outside the United States in wartime for the purpose of avoiding military service.

By and large these sections are the same as those in the Nationality Act of 1940 and amendments thereto, 54 Statutes 1170, 58 Stat. 4, 677, 747; 8 U.S.C. 801.

II. Cases.

A. Judge McLaughlin, Chief Judge of the U.S. District Court, Hawaii.

Judge McLaughlin in three cases has found sections 801(c) and (e) of Title 8 unconstitutional. These sections are now 8 U.S.C. 1481(a)(3) and (5) summarized as members 3 and 5 above. He has held that Congress does not have power under the Constitution to provide for ways by which a native born citizen can lose his citizenship other than by a formal naturalization in a foreign state. In this regard he is fighting a brave but losing battle, for no other district nor appellate courts agree with him. In fact his fellow district court judge in Hawaii, Justice Wiig, apparently ignores his opinions. See Takano v. Dulles, 116 F. Supp. 307 (1953) in which no mention is made of the Okimura and Murata cases with almost identical facts.

Judge McLaughlin first struck out on this brave new course in Okimura v. Acheson, 99 F. Supp. 587 (1951). The plaintiff, a native born American lived in Japan during the war. He served in the Japanese Army and voted in the Japanese elections in 1946 and 1947. The findings of fact indicate that neither action was voluntary and thus would not operate to divest the plaintiff of his citizenship. This has been the holding of numerous cases in the field. Judge McLaughlin, however, chose to avoid this basis of deciding the case, and immediately proceeded to the constitutional aspects. He held both sections 801(c) and (e) unconstitutional.

In a companion case Murata v. Acheson, 99 F. Supp. 591, decided on the same day, Judge McLaughlin found that the plaintiff who had had similar army service in Japan did not lose his citizenship

because section 801(c) was unconstitutional. As in the previous case he did not conclude whether the plaintiff's service was voluntary or involuntary, but recited the facts leading to his service and then found the section unconstitutional.

As these decisions were opposed to a long line of decisions which did not question the constitutionality of this section, an appeal was taken directly to the Supreme Court. In a per curiam decision, 342 U.S. 899 (1952) the judgment was vacated and the case remanded to the District Court for "specific findings as to the circumstances attending appellees service in the Japanese Army and voting in the Japanese elections and reasonable inferences to be drawn therefrom." The implication of the opinion is that the court would eventually decide the case on whether or not the acts were voluntary. Justice Douglas thought that the findings were adequate to show that the acts were involuntary. Justice Black thought the judgment should be affirmed.

These further findings of fact are put forth in 111 F. Supp. 303 (1953). The district court expanded the findings of fact and concluded that the service of the plaintiff in the Japanese Army was not voluntary, but that his voting was voluntary. Judge McLaughlin maintained his position that sections 801(c) and (e) were unconstitutional. In the companion Murata case he also found that the plaintiff's army service was involuntary and that section 801(c) was unconstitutional. The government did not appeal either decision.

In 1954 Judge McLaughlin had another opportunity to attack the statute in Tarada v. Dulles, 121 F. Supp. 6 (1954). It is this case that came to your attention. The plaintiff was conscripted into the Japanese Army and the court again found that his service was involuntary. Because of this finding of fact he did not this time rule on the constitutionality of section 801(c). Fortunately, however, the plaintiff had also voted in Japanese elections of 1946 and 1947. The court did find that this was voluntary and again struck down section 801(e) as unconstitutional. He was able to distinguish a leading Supreme Court case, McKenzie v. Hare, 239 U.S. 299 (1915), which the 9th Circuit Court of Appeals subsequently cited in upholding the constitutionality of section 801(e).

It should be noted in Judge McLaughlin's favor that he has considered the problems of dual nationality in these cases more completely than other courts, and his decisions might be upheld on this ground.

B. Other Courts.

Other courts when faced with the application of these sections have held them constitutional. Until recently the 9th Circuit

Court of Appeals has not had a chance to rule on this specific issue since Judge McLaughlin's three decisions. The many cases which came before them were decided on other grounds such as whether the acts were voluntary, whether the Japanese elections were elections in a foreign state, etc.

In a recent decision, Perez v. Brownell, 235 F.2d 364 (July 12, 1956) the 9th Circuit Court of Appeals faced the issue squarely and decided in favor of the constitutionality of these sections. The plaintiff was a native born American who had voted in a Mexican election and remained out of the country in order to avoid the draft. The court cited McKenzie v. Hare as supporting the power of Congress to designate ways by which a citizen can lose his nationality. It thus ruled that the present sections 801 and 1481 are within the power of Congress and constitutional. Specifically it ruled that section 801(j) and section 801(e) were constitutional. Section 801(e) was the same section Judge McLaughlin has termed unconstitutional three times.

An earlier case Acheson v. Wohlmuth, 196 F.2d 866 (1952), cert. denied 344 U.S. 833, decided by the United States Court of Appeals for the District of Columbia also considered the question of the constitutionality of 801(e). In this case the citizen had voted in a German election of 1946. The court held that she lost her citizenship because her voting was voluntary. They assumed that the statute was constitutional and stated that although under some circumstances she could be deprived of her citizenship unconstitutionally, there was no indication that this was the case on the record before them. At this point the court noted the first two decisions of Judge McLaughlin but dismissed them by saying "the judgment in both cases were vacated by the Supreme Court. . . and the cases were remanded for specific findings by the District Court". Judge McLaughlin's second opinion reaffirming the unconstitutionality of the statutes had not been published.

C. Significance of These Cases for the Agency.

In nearly all the cases which come up under this section the crucial question is whether the proscribed acts were done voluntarily. The holdings have been consistent in finding that if the acts were done involuntarily and under duress then the section does not apply and the person does not lose his citizenship.

Judge Prettyman's dissent in Soccodato v. Dulles, 226 F.2d 243 (1955) is an excellent review of court holdings in this field. He is of the opinion that the courts have gone so far in qualifying the effect of this section that the statute no longer has any meaning. He states:

> "This decision of the court is another long step in a progression of court decisions away from the terms of the applicable statutes. I think that step ought not to be taken."

I expect that these cases led to the enactment in the new Act of 8 U.S.C. 1481(b) in 1952 as follows:

> "Any person who commits or performs any act specified in subsection (a) of this section shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act."

The result of this section is that if a person has dual nationality and was present in the other state for 10 years prior to the prohibited act, a claim that his act was involuntary will be of no avail.

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D. Conclusion.

Even though Judge McLaughlin's gallant efforts to hold this section unconstitutional will apparently come to naught under the recent decision of his own 9th Circuit Court of Appeals, I think that the underlying rationale in all these cases is such that one of our agents in the field operating under our orders need not fear that he will lose his citizenship by doing one of the prescribed acts.

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